Filed 3/9/10 Evans v. Umina CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

ANDREW L. EVANS, Plaintiff and Respondent, v. LEONARD J. UMINA et al., Defendants and Appellants.	C060066 (Super. Ct. No. PC20070671)

Plaintiff Andrew L. Evans sued defendants Leonard J. Umina and Richard L. Simon (jointly, defendants) for defamation based on statements defendants made about Evans on a Web site, including intimating that the Securities and Exchange Commission (SEC) was suing Evans for fraud in Florida. Defendants filed a special motion to strike the complaint under Code of Civil Procedure section 425.16.[1]

[1] The lawsuits targeted by this statute are commonly referred to as strategic lawsuits against public participation or SLAPP lawsuits. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 71-72.) Code of Civil Procedure section 425.16 is commonly

The trial court concluded Umina could not invoke the anti-SLAPP statute because the Web site was "part of [an] overall strategy or scheme [on his part] to extort money from [Evans] to settle [other] litigation [between the parties] in Massachusetts" and therefore was not speech protected by the statute. As to Simon, the court focused its analysis on the statement on the Web site about the SEC litigation in Florida. Assuming for the sake of argument that the statement was protected under the anti-SLAPP statute and that Evans was a limited purpose public figure in relation to that statement, the court concluded Evans had shown a probability of prevailing because he made a prima facie showing that the "SEC Florida litigation statement on the website [wa]s an actionable false statement" made with actual malice. Accordingly, the trial court denied the special motion to strike.

On defendants' appeal from the denial of their motion (see § 425.16, subd. (i)), we will affirm. Much like the trial court, we conclude that even if the statement about the SEC litigation in Florida was protected under the anti-SLAPP statute and Evans was a limited purpose public figure for purposes of that statement, Evans still carried his burden of demonstrating a probability of prevailing in his defamation action based on that statement because he made a prima facie showing the

---

referred to as the anti-SLAPP statute. (*City of Cotati*, at p. 72.)

All further section references are to the Code of Civil Procedure unless otherwise indicated.

statement was substantially false and made with actual malice. Because this conclusion applies equally to both defendants, we need not separately consider whether the statements on the Web site were exempt from protection under the anti-SLAPP statute as to Umina because they were part of a scheme on his part to extort money from Evans.

FACTUAL AND PROCEDURAL BACKGROUND

The history of the litigation between the parties in Massachusetts is somewhat involved and need not be recounted in detail here. Suffice it to say that by the fall of 2007, defendants were prosecuting a civil case against Evans and others in state court in Massachusetts (case No. MICV2003-05178).

On October 5, 2007, a Web site was created with the name massachusettscivilaction.com. The site claimed to be copyrighted by defendants. The home page of the Web site began with a description of "Massachusetts Civil Action 03-05178K," which was defendants' lawsuit against Evans. This was followed by a list of seven "Related Cases." The fifth case on the list was "Lancer Management vs Evans, Willard, and Dominion (U.S. District S.N.Y. 01-CV-4860 (LMM)." The sixth case on the list was "SEC vs Evans, Willard, and Dominion et al (U.S. District S.FL 04-60899-CIV-MARRA and 03-80612-CIVF-MARRA)."

Alongside the list of related cases was a column containing the following text: "Many of the Court documents supplied in this section involve the same Defendant(s) and are related to MA CA 03-05178 through one or more of the corporate entities or

members of the Board of Directors. [¶] These complaints allege similar patterns of behavior by those involved. [¶] Nearly every case involves allegations of fraud by Andrew L. Evans. [¶] With the exception of the case now pending in Massachusetts, the only other active case is the SEC case in Florida. All other cases have settled. [¶] All of the public documents in these cases are available on this site as PDF documents. The complaints and allegations, taken together, form a critical mass of evidence that further substantiates and adds clarity to the operation, motives, and procedures used by Evans and others."

In fact, Evans was *not* a defendant in an action brought by the SEC in Florida. Case No. 04-60899-CIV-MARRA *is* an SEC case -- *SEC v. Michael Lauer, et al.* (the Lauer action) -- but Evans is not a party to that action. Case No. 03-80612-CIVF-MARRA is a receivership action -- *Steinberg v. Alpha Fifth Group, et al.* (the Steinberg action) -- that is ancillary to the Lauer action. Evans is one of many named as a defendant in the Steinberg action.[2]

Copies of the fourth and fifth amended complaints in the Steinberg action were linked to defendants' Web site. These complaints alleged that Lauer had caused certain transfers to be made to or for the benefit of the defendants (including Evans),

---

[2] The fourth amended complaint in the Steinberg action named as defendants (among others) "Dominion Income Management Corp. and/or Andrew L. Evans and/or Dean M. Willard."

and Steinberg, as receiver, was "su[ing] each of the Defendants to recover the transfers . . . ." The complaints contained causes of action for actual and constructive fraudulent transfer and unjust enrichment.

On October 17, 2007, Umina left a long voicemail message for Evans's attorney in the Massachusetts action, John F. Sylvia, in which he called Sylvia's attention to the Web site. In that message, Umina asserted (among other things) that it was his "strategy to put [Evans] in jail," then asserted, "So I am trying to do this guy a favor, and keep him from getting put in jail but all this stuff. At the same time, I do intend to get this case settled and over with, and I intend to have him pay, and if I don't get that far, or if we can't achieve that, I know we can get him incarcerated."

On October 18, after reviewing the Web site, Sylvia spoke with defendants' attorney in the Massachusetts case and informed him of the voicemail message and "the defamatory content of the Website, noting in particular that the Website inaccurately portrayed Mr. Evans as the target of a pending SEC suit." Sylvia followed up this conversation with a letter on October 19, in which he asserted that the "website is littered with falsehoods and content that is defamatory *per se*. For example, Mr. Umina falsely states that the Securities and Exchange Commission instituted legal action against Mr. Evans, Dean Willard and Dominion Income Management in the U.S. District Court for the Southern District of New York. This is false. Mr. Umina knows it is false, and his sole intent is to do harm

to my client's name and reputation." Sylvia threatened to sue immediately if the Web site was not taken down within 24 hours.

Defendants did not take down the Web site, so on November 5, 2007, Evans commenced the present action by filing a complaint for defamation.[3] The complaint alleges a single cause of action premised on various "false and defamatory statements" concerning Evans on the Web site, including "[a] claim that the Securities Exchange Commission has instituted and is currently prosecuting claims against . . . Evans and others in litigation proceeding in the United States District Court for the Southern District of Florida."

As late as December 31, 2007, the Web site's assertion about the SEC case against Evans had not been revised.

On January 11, 2008, defendants filed a special motion to strike Evans's complaint. In his declaration in support of the motion, Simon claimed that in asserting Evans was a defendant in an action by the SEC in Florida, he and Umina had relied on PACER -- "an electronic public access service run by the Administrative Office of the United States Courts, which allows users to obtain federal court case and docket information via the Internet" -- which listed Evans as a defendant in the Lauer action. Simon asserted that he and Umina had "just learned that [the Lauer action] does not name Evans as a defendant," but

---

[3] The complaint purports to be for "defamation and libel," but libel is actually just a type of defamation. (Civ. Code, § 44 [defamation is either libel or slander].)

Evans was a defendant in the related Steinberg action. He further claimed they had "modified the relevant language on our website to reflect these facts."

In ruling on the special motion to strike, the trial court concluded Umina could not invoke the anti-SLAPP statute because, along with the voicemail message to Evans's attorney, the Web site was "part of [an] overall strategy or scheme [on his part] to extort money from [Evans] to settle the litigation in Massachusetts" and therefore was not speech protected by the statute. Concluding "the evidence [wa]s insufficient to establish as a matter of law that . . . Simon was using the web site disclosures to extort money from [Evans]," the court focused its remaining analysis on the statement on the Web site about the SEC litigation in Florida. Assuming for the sake of argument that the statement was protected under the anti-SLAPP statute and that Evans was a limited purpose public figure in relation to that statement, requiring him to show actual malice by clear and convincing evidence, the court concluded Evans nonetheless had shown a probability of prevailing because he had made a prima facie showing that the "SEC Florida litigation statement on the website [wa]s an actionable false statement" made with actual malice. Accordingly, the trial court denied the special motion to strike.

Defendants filed a timely notice of appeal from the order denying the motion.

DISCUSSION

I

Overview Of The Anti-SLAPP Statute

The Legislature enacted section 425.16 to address "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Under this section, a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," is subject to a special motion to strike "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*, subd. (b)(1).)

"Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' [Citation.] If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) "Only a cause of action that satisfies *both* prongs of

the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 89.)

To demonstrate a probability of prevailing, the plaintiff must "demonstrate that the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the plaintiff's evidence is credited. [Citation.] The court considers the pleadings and the supporting and opposing affidavits stating facts on which the liability or defense is based, and the motion to strike should be granted if, as a matter of law, the properly pleaded facts do not support a claim for relief." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 901.) "Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

On appeal, "[w]e review the trial court's rulings on an anti-SLAPP motion de novo." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

II

Defendants' Arguments

On appeal, defendants assert the trial court erred in denying the special motion to strike because they showed the statements on the Web site were within the scope of the anti-SLAPP statute, the statements were not illegal as a matter of law as part of a scheme to extort money from Evans, and Evans did not show a probability of prevailing because the challenged statements were either statements of opinion, substantially true, or rhetorical hyperbole. They also contend Evans did not show a probability of prevailing because Evans is a limited purpose public figure and any statements asserting provably false facts were not made with actual malice, and because Evans did not show any special damage as required by Civil Code section 45a.

Like the trial court, we will focus our analysis on the statement about the SEC litigation in Florida and will assume for the sake of argument that the statement was protected under the anti-SLAPP statute and that Evans was a limited purpose public figure in relation to that statement, requiring him to show actual malice by clear and convincing evidence. Unlike the trial court, we will also assume that as to Umina, the statement was *not* part of a scheme to extort money from Evans.[4] Even with

---

[4] Because we draw these assumptions in defendants' favor, we need not consider their argument that the trial court erred in refusing to consider certain evidence they offered with their reply to Evans's opposition to the special motion to strike

these favorable assumptions, however, we find no merit in defendants' remaining arguments because Evans has shown a probability of prevailing based on a prima facie showing that the statement regarding the SEC litigation in Florida was substantially false and made with actual malice.

III

Probability Of Prevailing

A

Substantial Truth

Defendants claim the assertion on the Web site that Evans was the subject of a pending civil suit for fraud initiated by the SEC was "a substantially true statement" and therefore not actionable as defamation; thus, Evans did not demonstrate a probability of prevailing based on that statement. We disagree.

"It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case." (*Kurata v. Los Angeles News Pub. Co.* (1935) 4 Cal.App.2d 224, 227.)

Defendants contend "[t]he gist or sting of the challenged statement here was that an SEC-initiated civil suit for fraud was proceeding against [Evans] in Florida" and that "was

---

because none of that evidence was material to the issues we actually address.

substantially true" because "[t]he SEC requested that a receiver be appointed and that receiver instituted an action for fraud in Florida against [Evans] and others." We disagree. The complaints from the Steinberg action linked to the Web site show that Evans was not being sued for fraud by the receiver, but was one defendant among many to causes of action for actual and constructive *fraudulent transfer* and unjust enrichment based on transfers made by Lauer -- the defendant in the action by the SEC. Fraudulent transfer and fraud are very different legal concepts. "A fraudulent [transfer] is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13.) The ill intent in a case of fraudulent transfer belongs to the transferor -- here, Lauer -- not the transferee.

Furthermore, we need not rely on an attorney's understanding of the difference between fraudulent transfer and fraud to conclude that the "sting" of the statement on the Web site about an SEC action against Evans for fraud was not justified because the complaints linked to the Web site alleged wrongdoing by Lauer, not by Evans. Specifically the complaints alleged that Lauer caused transfers to be made to or for the benefit of the defendants (including Evans), and Steinberg, as receiver, was "su[ing] each of the Defendants to recover the transfers . . . ." The complaints further alleged that "Lauer caused the Receivership Entities to make each of the specified

Transfers to the respective Defendants . . . with the actual intent to hinder, delay, and defraud the creditors of the specified Receivership Entities," or, in the alternative, that he caused the transfers to be made when he "knew or should have known that each of the Receivership Entities was insolvent, and that the Receivership Entities would not be able to satisfy its liabilities as they came due." There was no allegation in the complaints that Evans himself had committed any kind of fraudulent act or had done anything wrong in receiving the fraudulent transfers attributed to Lauer.

The trial court concluded that "[t]he 'sting' of the remark that a businessperson is being civilly prosecuted by the SEC for fraud is of an entirely different magnitude and is much greater and entirely different than a civil suit for fraud by a receiver." This observation is all the more true when it is recognized that the receiver was not suing Evans for fraud, but merely for receiving a fraudulent transfer. Consequently, we agree with the trial court that Evans demonstrated a probability of prevailing by showing the statement on the Web site about him being sued by the SEC for fraud was not substantially true, but instead was substantially false.

B

Actual Malice

Defendants contend Evans did not demonstrate a probability of prevailing because he "did not present clear and convincing evidence that" the statement about the SEC litigation against

Evans in Florida was "made with actual malice." Again, we disagree.

In a defamation action, "If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence [citation], that the libelous statement was made with '"actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256.) "This heightened standard of proof must be taken into account in deciding a defendant's motion to strike a claim for defamation under section 425.16." (*Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1446.)

"'[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.'" (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at pp. 256-257.) "But even in a public figure case, a defendant's knowledge of falsity or reckless disregard can be proved by circumstantial evidence. [Citation.] Such factors as a failure to investigate the facts, or anger and hostility toward the plaintiff, may indicate that the defendant had serious doubts regarding the truth of the publication. [Citation.] The finder of fact must determine

whether the publication was indeed made in good faith." (*Walker v. Kiousis*, *supra*, 93 Cal.App.4th at p. 1446.)

Here, there was enough circumstantial evidence to establish a prima facie showing of clear and convincing evidence that defendants made the statement on their Web site about Evans being sued by the SEC for fraud in Florida with reckless disregard for the truth or falsity of that statement. Defendants argue the contrary based largely on their assertion that they "relied on the presumably authoritative PACER database run by the federal court system, which expressly listed [Evans] as a defendant in [the Lauer action]." But in determining whether Evans demonstrated a probability of prevailing, we do not assume the truth of *defendants'* evidence; "[i]nstead, we accept as true all evidence favorable to [Evans] and assess [defendants'] evidence only to determine if it defeats [Evans]'s submission as a matter of law." (*Overstock.com, Inc. v. Gradient Analytics, Inc.*, *supra*, 151 Cal.App.4th at pp. 699-700.)

Viewing the evidence most favorably to Evans, what it showed was this: Defendants possessed, and were able to link to their Web site, copies of the fourth and fifth amended complaints in the Steinberg action, which showed that Evans was a defendant to causes of action for fraudulent transfer and unjust enrichment in that action. They did *not* link their Web site to a copy of the complaint in the Lauer action, even though presumably they could have obtained a copy of that complaint from the same source as they obtained the complaints in the

Steinberg action, and even though they asserted on the Web site that "[a]ll of the public documents in these cases are available on this site." Without checking the complaint in the *Lauer* action, they asserted on their Web site that Evans was being sued by the SEC and strongly intimated that the suit was for fraud. Moreover, two weeks after they created the Web site their attorney in the Massachusetts action was informed that the site inaccurately portrayed Evans as the target of a pending SEC suit. Nevertheless, over two months later, and nearly two months after being sued for defamation based on the Web site, defendants had not revised the assertion about the SEC litigation in Florida. Taken as a whole and viewed most favorably to Evans, this evidence is sufficient to establish a prima facie showing that defendants entertained serious doubts about the truth of their assertion but left it up anyway.

Defendants try to refute the foregoing analysis by arguing that "Attorney Sylvia's letter to [their] former counsel in the Massachusetts Action did not in fact put [them] on notice of the error in the citation on their website, because Sylvia's letter asserted that it was false that the SEC instituted legal action against [Evans] 'in the U.S. District Court for the *Southern District of New York*,'" but the statement on the Web site at issue here "referenced an SEC action in *Florida*, not New York." Thus, in defendants' view, "Sylvia's letter did not warn that the *actual* statement on the Web site at issue here was incorrect."

This argument, like so many of defendants' arguments, depends on us viewing the evidence most favorably to *them*, which we cannot do. Most notably, defendants ignore the telephone call that preceded the letter, in which Sylvia told defendants' attorney more generally that "the Website inaccurately portrayed Mr. Evans as the target of a pending SEC suit." Furthermore, as to the letter itself, even though Sylvia erroneously referred to the district court in New York (perhaps conflating the entry about the SEC action in Florida with the case listed immediately above, which was in the New York district court but was not brought by the SEC), a finder of fact could conclude inferentially that defendants must have known that Sylvia meant to refer to the SEC suit in Florida.

Additionally, we must observe that we are under no obligation to credit Simon's assertion in his declaration that he and Umina had "just" learned Evans was not a defendant in the Lauer action. As we have explained already, we view the evidence in favor of Evans, not defendants. And doing so, we, like the trial court, conclude Evans made the showing of "minimal merit" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89) necessary to defeat defendants' special motion to strike.

C

Special Damage

Asserting an argument they made in the trial court for the first time in their reply brief (giving Evans no chance to respond to it), defendants claim Evans "did not establish a probability of prevailing because he failed to even attempt to

show that he suffered any special damage as a result of the challenged statements." Defendants claim such a showing was necessary because the statements on which Evans's action is based are not libelous on their face. (See Civ. Code, § 45a ["A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof"].) We disagree.

"Material libelous *per se* [i.e., on its face] is a false and unprivileged publication by writing which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (*Washburn v. Wright* (1968) 261 Cal.App.2d 789, 797; see Civ. Code, § 45.) Under this standard, it appears self-evident to us that a statement falsely accusing a business person of being sued by the SEC for fraud qualifies as libelous on its face. Certainly defendants have not convinced us to the contrary with their one-paragraph, three-sentence argument on the point in their opening brief. Thus, we reject this argument, too, and conclude the trial court did not err in denying defendants' special motion to strike.

DISPOSITION

The order denying the special motion to strike is affirmed. Evans shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ROBIE, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.